
Docket No. 11-56986

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SGT. JEFFREY S. SARVER,

Plaintiff-Appellant

vs.

NICHOLAS CHARTIER; et. al.,

Defendants-Appellees.

**On Appeal from the United States District Court, Central District of California
No. 2:10-CV-09034 JHN-JC
JUDGE JACQUELINE H. NGUYEN**

EXCERPTS OF RECORD – VOL. II
(pgs. 71-228)

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SGT. JEFFREY S. SARVER,

Plaintiff,

vs.

THE HURT LOCKER, LLC, MARK
BOAL, KATHRYN BIGELOW, GREG
SHAPIRO, NICOLAS CHARTIER,
TONY MARK, DONALL McCUSKER,
SUMMIT ENTERTAINMENT, LLC,
VOLTAGE PICTURES, LLC,
GROSVENOR PARK MEDIA, LP,
FIRST LIGHT PRODUCTIONS, INC.,
KINGSGATE FILMS, INC., and
PLAYBOY ENTERPRISES, INC.,
Jointly and Severally,

Defendants.

Case No.: 2:10-cv-09034-JHN (JCx)

**PLAINTIFF'S NOTICE OF
APPEAL TO THE UNITED
STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Notice is hereby given that Sgt. Jeffrey S. Sarver, the plaintiff herein, hereby
appeals to the United States Court of Appeals for the Ninth Circuit from the final

1 judgment of the District Court, entered in this case on October 13, 2011, and all
2 interlocutory orders that gave rise to that judgment, including but not limited to:

3 1. Order denying Plaintiff's Motion for stay of Execution and Waiver of Bond
4 Pending Appeal. [Doc. No. 156.]
5

6 Dated: March 5, 2012

COZEN O'CONNOR

7
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SGT. JEFFREY S. SARVER,
Plaintiff,

v

THE HURT LOCKER, LLC, MARK
BOAL, KATHRYN BIGELOW, GREG
SHAPIRO, NICOLAS CHARTIER,
TONY MARK, DONALL McCUSKER,
SUMMIT ENTERTAINMENT, LLC,
VOLTAGE PICTURES, LLC,
GROSVENOR PARK MEDIA, LP,
FIRST LIGHT PRODUCTIONS, INC.,
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(JCx)

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1 Notice is hereby given that Sgt. Jeffrey S. Sarver, the plaintiff herein, hereby
2 appeals to the United States Court of Appeals for the Ninth Circuit from the final
3 judgment of the District Court, entered in this case on October 13, 2011, and all
4 interlocutory orders that gave rise to that judgment, including but not limited to:

- 5 1. Order granting Defendants Motions to Strike (Doc. No. 129, granted and
6 issued on October 13, 2011, attached hereto as Exhibit A.)
- 7 2. Order granting Motion to Change Venue to the Central District of
8 California, (Doc. No. 55, entered November 19, 2010, attached hereto as
9 Exhibit B.)

10
11 Dated: November 10, 2011

COZEN & O'CONNOR

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Erik L. Jackson
Attorneys for Plaintiff, Sgt. Sarver.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HONORABLE JACQUELINE H. NGUYEN, JUDGE PRESIDING

JEFFREY S. SARVER,

Plaintiff,

vs.

THE HURT LOCKER, LLC, et al.,

Defendants.

No. CV 10-9034-JHN-JC

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, August 8, 2011, 2:53 P.M.

Defendants' Motion to Strike Complaint

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1 LOS ANGELES, CALIFORNIA; MONDAY, AUGUST 8, 2011; 2:53 P.M.

2 -oOo-

3 THE CLERK: All rise. This United States District
4 Court for the Central District of California is now in
5 session. The Honorable Jacqueline H. Nguyen, Judge
6 Presiding.

7 Calling Civil Case 10-9034-JHN-JC, Jeffrey S.
8 Sarver vs. The Hurt Locker LLC, et al.

9 Please state your appearances for record.

10 MR. WEGLARZ: Your Honor, Todd Weglarz for the
11 plaintiff.

12 MR. DOOLEY: Nathan Dooley for the plaintiff.

13 MR. GORRY: Good afternoon, Your Honor.
14 Timothy J. Gorry, Eisner, Kahan & Gorry, on behalf of -- and
15 I'll have to read them all off here -- defendants Hurt
16 Locker LLC, Greg Shapiro, Nicolas Chartier, Voltage Pictures
17 LLC, Grosvenor Park Media LP, and Kingsgate Films, Inc.

18 MR. HALBERSTADTER: Good afternoon, Your Honor.
19 David Halberstadter for defendants Summit Entertainment LLC.

20 THE COURT: Good afternoon.

21 MR. REYNOLDS: Good afternoon, Your Honor.
22 Jeremiah Reynolds on behalf of defendants Mark Boal and
23 Kathryn Bigelow.

24 MS. JOSEPH: And good afternoon, Your Honor.
25 Jackie Joseph from Eisner, Kahan & Gorry on behalf of the

1 Hurt Locker LLC, Nicolas Chartier, Gregory Shapiro, Voltage
2 Pictures LLC, Grosvenor Park Media, and Kingsgate Films.

3 THE COURT: All right. Good afternoon to
4 everyone.

5 I did issue a full written tentative in this
6 matter. I take it that all parties or counsel have had an
7 opportunity to review the court's written tentative.

8 Is that fair to say?

9 MR. WEGLARZ: Yes, Your Honor.

10 THE COURT: All right. Then let me have --
11 actually, let me have the moving party take the lectern
12 first to address the court's tentative unless you wish to
13 submit.

14 If you submit, you don't have to take the lectern;
15 but if you don't, I will give you an opportunity to be
16 heard.

17 MR. GORRY: Well, Your Honor, on the -- what we've
18 agreed to do is that to the extent that the court wishes to
19 address the anti-SLAPP motion, the jurisdictional issues, I
20 would address those arguments to the extent that the court
21 wants to hear regarding -- discussion regarding the
22 substantive causes of action.

23 Both Mr. Halberstadter and Mr. Reynolds are
24 prepared to address that.

25 So I guess, to a certain extent, based on your

1 tentative, you know, I would seek some guidance as to what
2 you would like us to address as opposed to arguing the whole
3 motion since you've obviously covered it well in your
4 tentative.

5 THE COURT: Well, given the complexity and the
6 number of issues in this case, that's why I really did want
7 to have a written tentative before counsel came in for
8 argument because I wanted you to argue off the tentative.

9 So if there's something that is contained in the
10 written tentative that you think the court erred on, that's
11 what I want to hear from you about.

12 MS. JOSEPH: Okay.

13 THE COURT: So if you think the court is correct,
14 by all means, there's need to address it any further.

15 MR. GORRY: Well, as you can probably guess, Your
16 Honor, we do want to actually address a couple of issues,
17 the first of which is the court's tentative ruling as it
18 relates to the misappropriation of name and likeness; and I
19 believe Mr. Halberstadter will start with that argument.

20 THE COURT: All right.

21 MR. HALBERSTADTER: Good afternoon, Your Honor.
22 So I guess I get to tell the court where it erred; is
23 that --

24 THE COURT: Please do. I welcome comments.
25 That's why you're here.

1 MR. HALBERSTADTER: Thank you, Your Honor.

2 With respect to the right of publicity claim, the
3 court's tentative makes two main findings.

4 First, that the plaintiff has made a *prima facie*
5 showing in support of its claim -- his claim; and, secondly,
6 that the defendant's First Amendment transformative use
7 defense is belied by certain factors that the court listed.

8 The majority of my argument will focus on that
9 latter finding; but before turning to it, I'd like to make a
10 couple of brief points about the court's tentative
11 conclusions about plaintiff's *prima facie* showing.

12 The tentative ruling that plaintiff has made a
13 *prima facie* showing in support of his right of publicity
14 claim appears to be based on two main findings that
15 plaintiff presented evidence that he's identifiable in the
16 film because details of his actual life story are included
17 in the *Playboy* and *Reader's Digest* articles and, secondly,
18 that plaintiff presented evidence that Sergeant Will James,
19 that character in the motion picture, was based on him given
20 that Mr. Boal, the writer, followed him closely while he was
21 embedded in Iraq; that Mr. Boal wrote the *Playboy* article
22 and the script; that there are some similarities between the
23 plaintiff and the Sergeant James character and some
24 statements made by Jeremy Renner in a *YouTube* interview
25 suggesting that the character he played was like this one

1 guy, in rough quotes.

2 Well, first, Your Honor, basing a fictional
3 character upon an actual person is not the legal equivalent
4 of using a person's name, voice, photograph, likeness, or
5 even his or her identity.

6 Many fictional characters are based to one degree
7 or another on real people. That is the acorn from which
8 most writers create their characters.

9 Mr. Boal's familiarity with the plaintiff may well
10 have helped him create the Sergeant James character; but the
11 fact that Mr. Boal knew plaintiff and was able to observe
12 him in action in Iraq does not, in our view, constitute
13 *prima facie* evidence that the film misappropriated
14 plaintiff's likeness or his identity.

15 To the extent --

16 THE COURT: Would you concede though, counsel,
17 that there are striking similarities between the *Playboy*
18 article, which admittedly is about the plaintiff, and the
19 movie itself?

20 MR. HALBERSTADTER: No, Your Honor. I think that
21 there are certainly a number of similarities between the
22 Sergeant James character and plaintiff as his background,
23 et cetera, are described in the *Playboy* article.

24 However, a great number of those similarities, I
25 believe, are common to members of the military in general

1 and EOD -- I tend to search around the letters a little too
2 much -- the EOD technicians in particular.

3 There are certain characteristics that they share;
4 but there are many, many differences between those two
5 characters as well.

6 For example, the article describes the plaintiff
7 as having grown up in a trailer park in West Virginia, not
8 the same for the Sergeant James character. His age is
9 different.

10 He makes certain statements that are quoted in the
11 article, which I will not repeat in court, that are not used
12 by the Sergeant James character. The age of his son is
13 different. He has a different girlfriend pregnant with
14 another child. Not the same as Sergeant James character.

15 His marital status is different. Apparently, the
16 plaintiff -- at least his team members would comment on how
17 the plaintiff would frequently give the rest of his team
18 members marital advice when he wasn't married; and they
19 found that ironic; and it's not something that's depicted in
20 the motion picture at all.

21 His father was a carpenter. They used to go
22 hunting together.

23 THE COURT: But is that the right way to approach
24 it for the court? Would you have the court get down to the
25 level of details and sort of act as the trier of fact and

1 doing a scene-by-scene, characteristic-by-characteristic
2 comparison? *Prima facie* case. That's not a very high
3 threshold.

4 Or should the court say: Look. There are some
5 striking similarities here albeit some differences as well;
6 and that's sufficient to find that the plaintiff has met his
7 burden of establishing a *prima facie* case and that a
8 reasonable trier of fact looking at all of that and weighing
9 his testimony at trial would say: I think there's been
10 misappropriation here.

11 Shouldn't they be allowed to get passed at least
12 this stage with those similarities already identified by the
13 court?

14 MR. HALBERSTADTER: Well, I don't think that the
15 anti-SLAPP statute, or the cases deciding it, really address
16 Your Honor's point; and I certainly understand the point.

17 However, I think that if the -- in my view, the
18 differences and similarities that we're talking about right
19 here would not be sufficient to get the plaintiff past
20 summary judgment; and I think it's the same standard.

21 So if he has to establish a *prima facie* case on
22 all the elements of his claim, which is what he would have
23 to do for surviving summary judgment, I don't think these
24 similarities, given all of the multiple differences not only
25 in the character but in the experiences described as that

1 character is described as having in the film, suffice to
2 satisfy the *prima facie* case.

3 That said, there's a little more and I want to
4 mention that as well as long as we're talking about the
5 characteristics.

6 Because not only are the characteristics of the
7 plaintiff and the characteristic of the Sergeant James
8 character overlapping in some generic ways but very
9 different in others. So, too, are the stories and the
10 missions that he has undertaken.

11 And since the court is talking about the
12 misappropriation in the context of an identity, not just a
13 likeness, I thought it would be worth mentioning those, too.

14 There are a number of missions that are described
15 in the *Playboy* article that don't appear anywhere in the
16 film. I can identify them for the court if the court wants.

17 There are a number of missions in the film that
18 are nowhere in the *Playboy* article including, among others,
19 disarming a bomb inside the hood -- under the hood of a
20 vehicle; disarming a bomb placed in a body cavity of a dead
21 boy, leaving the base to look for a child who he had
22 befriended; being under sniper fire; a man trapped -- trying
23 to disarm a man trapped in a bomb vest who was put in that
24 bomb vest against his will.

25 So I think given all of these substantial

1 dissimilarities that can be gleaned from comparing the film
2 to the article, we would urge the court to assess this under
3 a summary judgment standard and find that the plaintiff has
4 not met his initial burden of proof.

5 That having been said, I would like to focus
6 primarily on the court's tentative finding that -- at least
7 as I read the tentative -- that the same factors: Boal's
8 having been embedded, having written both the article and
9 the screenplay, the actor's statement which incidentally is
10 hearsay and objected to, and the similarities and
11 differences between the two works, that the First Amendment
12 transformative use defense has been belied by those factors.

13 In that regard, the tentative appears to have
14 rejected the First Amendment defense without having applied
15 the California Supreme Court's required balancing test for
16 resolving conflicts between the First Amendment and the
17 right of publicity without assessing, at least in the
18 tentative, the extent to which the film incorporates
19 significant creative elements aside from plaintiff's -- the
20 arguable use of plaintiff's identity in order to determine
21 whether the film as a whole is transformative without
22 considering the broader First Amendment protections that are
23 afforded to works of the public interest -- in the public
24 interest which this court has found the film to be.

25 Focusing first on the balancing test, I think it's

1 important to underscore a few of the holdings of the *Comedy*
2 *III* and *Winters* cases decided by the California Supreme
3 Court.

4 First is that transformative does not mean or
5 require, although it can include, that there is some
6 physical or visual or auditory alteration of the
7 individual's name, voice, photograph, or likeness.

8 Rather, the transformative test focuses on the
9 work as a whole and asks whether an individual's name,
10 voice, photograph, likeness, or even identity has been
11 combined with other creative elements such that the work as
12 a whole is transformed into something that is more than a
13 mere likeness or imitation of the individual and such that
14 the individual's likeness is simply one of the raw materials
15 from which an original work has been synthesized.

16 California Supreme Court's ruling make clear that
17 a broad range of works satisfy this test, not just
18 cartoon-like distortions as in *Winter*, but also factual
19 reporting and fictionalized portrayals.

20 Under those two cases the court is not supposed to
21 just consider the similarities and differences between the
22 plaintiff and the character that is claimed to be an
23 appropriation of his likeness, rather, the court is supposed
24 to conduct an analysis of the work as a whole to determine
25 whether it combines the plaintiff's likeness with other

1 creative elements to create a work that is more than not
2 merely a duplication of the plaintiff's likeness.

3 I think that when the film is viewed as a whole
4 and the transformative test is applied to it, the motion
5 picture *The Hurt Locker* is a prototypically transformative
6 work that is entitled to First Amendment protection as a
7 matter of law even if its main character is based entirely
8 on plaintiff and his real-life experiences.

9 Even if we assume for purposes of this portion of
10 the argument that the Sergeant James character was a close
11 or virtual replica of plaintiff, plaintiff's likeness or
12 identity have been combined with many, many original
13 elements of creative expression by the writer, the director,
14 the actors, and the cinematographer, among others.

15 The film includes many plot lines and subplots
16 that are wholly invented and not based on anything in
17 plaintiff's real life, at least as described in the *Playboy*
18 article.

19 It includes many other characters who have been
20 invented for the film who the plaintiff does not even allege
21 to be similar to people in his life including the members of
22 his EOD squad.

23 All of the film's dialogue has been invented and
24 is not claimed other than with respect to the phrase "the
25 hurt locker" and perhaps "war is a drug" to be words that

1 plaintiff or those around him have ever said.

2 The overarching storyline and themes, though
3 authentic in feel, are fictional. The cinematography and
4 the soundtrack were created for the film.

5 The skilled direction and editing are creative
6 elements that have been combined with everything else to
7 synthesize this film.

8 So based on these factors, all evidence from the
9 film itself, I don't believe that the court can reach a
10 conclusion other than that plaintiff's likeness or his
11 identity, even if it was the basis for the main character
12 and even if it was incorporated wholesale, is anything other
13 than one of the raw materials, not the sum and substance of
14 the film.

15 But there's more. In fact, to the extent that the
16 plaintiff's likeness or identity could be considered the
17 basis for the Sergeant James character, it, too, has been
18 somewhat modified and transformed by creative elements.

19 The character doesn't bear his name, doesn't use
20 his actual likeness, although plaintiff claims that the
21 actor used to depict that character resembles him in certain
22 respects.

23 The character's military background is different,
24 how he was deployed to Iraq was invented. His personal
25 background and relationship history are different.

1 Many of the things that he does and the
2 experiences he has have been invented. His dialogue has
3 been invented and so on.

4 So under the relevant case law, I believe that
5 this film easily satisfies the transformative use test.

6 A finding that this film is entitled to First
7 Amendment protection as a matter of law because it is a
8 transformative work would be in line with other California
9 cases involving fictionalized portrayals of real people and
10 events, including docudramas where they are intended to be
11 portrayals, though fictionalized, of real identifiable
12 people.

13 *Guglielmi* is the most obvious example, was a
14 docudrama about Rudolph Valentino, decided before *Comedy III*
15 and *Winter* and so it did not apply the transformative test
16 *per se*.

17 But the California Supreme Court found that there
18 was substantial -- that the substantial creative expression
19 included in the film outweighed any right of publicity that
20 otherwise would have existed.

21 *Polydoras*, which I know Your Honor has
22 distinguished on the basis that it's purely fictional so I
23 won't spend too much time with that.

24 The *Kirby* lawsuit, which involved a video game and
25 a character, I think that's a specifically notable case

1 because in that instance the court, although it found that
2 the video game, animated character-protagonist of the video
3 game bore a number of similarities to the plaintiff, the
4 court also found that the plot and the setting of the video
5 game were different.

6 The dance moves and the music were all creative
7 elements that were new and added and supported a
8 transformative use.

9 The finding that I'm urging the court to make
10 today is also in line with many cases from other
11 jurisdictions involving fictionalized portrayals that are
12 admittedly about real people and their experiences.

13 In *Hicks*, it involved a book and a docudrama about
14 Agatha Christie. *Matthews* case -- and I can provide the
15 full citations for all these if Your Honor wants them.

16 THE COURT: I don't.

17 MR. HALBERSTADTER: Okay.

18 THE COURT: I understand where you're going with
19 the argument.

20 MR. HALBERSTADTER: Okay.

21 THE COURT: You're basically saying that the court
22 didn't weigh it carefully enough; and upon further
23 reflection, you're going to win on the transformative use.

24 MR. HALBERSTADTER: I'm actually saying that I
25 don't see from the tentative that the court engaged in an

1 evaluation of the work as a whole at all as opposed to a
2 comparison of the plaintiff to the fictional character; and
3 I'm urging the court that under the *Winter's* and *Comedy III*
4 test that's what it is supposed to do.

5 THE COURT: All right.

6 Anyone else from the defense wish to be heard?

7 (No response.)

8 THE COURT: Thank you, counsel.

9 MR. HALBERSTADTER: Thank you, Your Honor. I
10 appreciate it.

11 MR. REYNOLDS: Good afternoon, Your Honor.

12 I promise to be very brief. I know Mr. Weglarz is
13 itching to get up here.

14 I would submit to the court respectfully that it
15 is clear that the First Amendment bars completely the
16 plaintiff's right of publicity claim; and I would point to
17 two findings made by the court that are critical to this
18 analysis.

19 First of all, the court has found that the film
20 involves an issue of public interest. The court quotes --
21 or quote from the court is: The article and the movie
22 directly address a problem of improvised explosive devices
23 and the men who diffuse them, an issue of paramount
24 importance at that point in the war.

25 The other finding made by the court is that on

1 page 17 the court notes that: Private individuals must
2 establish actual malice if a defamation involves an issue of
3 public issue.

4 That same finding must be applied to the court --
5 to the plaintiff's right of publicity claim under numerous
6 precedents; and I want to talk about four cases
7 specifically.

8 The first time is *Time v. Hill* from 1967. That's
9 a U.S. Supreme Court case, 385 U.S. 374.

10 That case holds that the actual malice standard
11 must be applied to actions that seek to hold defendants
12 liable for reporting on matters of public interest; and the
13 court could look at page 388 and 389 of that opinion for
14 that holding.

15 The Ninth Circuit has also found very specifically
16 in connection with the California Civil Code, Section 3344,
17 right of publicity claim and the common-law claim that,
18 again, claims that involve the public interest, the
19 plaintiff must establish actual malice to get by the First
20 Amendment.

21 Again, that's *Hoffman v. Capital Cities*, 255 F.3d
22 1180, Ninth Circuit, 2001, page 1186 to 1187 of the court's
23 opinion, the court makes that specific holding.

24 The California courts have also held that, again,
25 matters that involve the public interest, even if you're

1 bringing a claim for invasion of privacy or for a violation
2 of right of publicity, must apply the actual malice
3 standard.

4 *Dora v. Frontline Video*, 15 Cal.App.4th 536. It's
5 a 1993 case. The court holds at page 543 and 544 that the
6 actual malice standard applies to right of publicity claims
7 where, again, there's an issue of public interest involved.

8 The last case is a case cited by the court in your
9 tentative opinion. That's *Stewart v. Rolling Stone LLC*, 181
10 Cal.App.4th, 664. That's a 2010 case. Again, another case
11 involving a right of publicity claim by several indie
12 musicians.

13 Again, the court holds on page 682: A defendant
14 publisher may assert actual malice standard applies to
15 claims for commercial misrepresentations whether claims are
16 under the common law or Civil Code Section 3344.

17 If the court applies those cases to the facts of
18 this case, it's very clear that the plaintiff's claim is
19 barred.

20 I have copies of those cases for the court. I'd
21 like to, with the court's permission, I have already
22 provided copies to counsel for plaintiff.

23 If it pleases the court, I'd like to provide
24 copies of those cases to the court.

25 THE COURT: All right. You may do so after the

1 hearing.

2 MR. REYNOLDS: Thank you very much, Your Honor.

3 I would just say in closing that I would
4 respectfully ask court to think about the impact of its
5 holding.

6 Again, we have a situation involving a film, a
7 highly popular film that involved an issue of public
8 interest. Your holding that even though it involves issues
9 of public interest, the plaintiff can come and sue based
10 upon a right of publicity.

11 That's going to directly impact artists,
12 directors, screenwriters going forward; and, again, the
13 Supreme Court has set up protections for this very situation
14 so I urge the court to look at those cases.

15 Thank you very much.

16 THE COURT: All right. Thank you very much.

17 MR. GORRY: Your Honor, just one final point.

18 THE COURT: Sure.

19 MR. GORRY: I didn't want to be left out here.

20 The point that I'd like to address quickly, Your
21 Honor, is in the tentative itself you state that, after
22 discussing the *ComputerXpress*, that the defendants are not
23 entitled to their attorney's fees because the most
24 significant claim in your estimation still remains.

25 Under California law, as the court is well aware,

1 Section 42 --

2 THE COURT: Well, significant, perhaps that's
3 maybe a poor choice of words. The heart of the plaintiff's
4 Complaint -- let's put it that way. The core of his
5 allegation is: Look. You took my identity and you made
6 this movie out of it.

7 MR. GORRY: Okay. And I understand that, Your
8 Honor. In connection with that, under *ComputerXpress*, which
9 the court cites, and under several cases that follow it --
10 *Morrow v. United States* or -- excuse me -- *Los Angeles*
11 *United School District*, 149 Cal.App.4th 1424, and *Mann v.*
12 *Quality Old Time Service, Inc.*, 139 Cal.App.4th 328, the
13 courts analyze 42516 and the requirement regarding
14 attorney's fees for partially prevailing parties.

15 And what those cases hold is that a partially
16 prevailing defendant, or moving party -- generally, it's the
17 defendant obviously -- who brings an anti-SLAPP motion need
18 not succeed in striking every challenge claimed to be
19 considered a prevailing party within the meaning of 42516.

20 In the *Mann* case, the court discusses and
21 ultimately holds that a party who partially prevails on an
22 anti-SLAPP motion must generally be considered a prevailing
23 party unless the results of the motion were so insignificant
24 that the party did not achieve any practical benefit from
25 bringing the motion.

1 And in the *Mann* case, it discusses that the court
2 shall apportion the attorney's fees award based on the
3 result.

4 What we would submit here, Your Honor, is that in
5 this case, if you take a look at the causes of action that
6 the court in its tentative -- assuming the court adheres to
7 its tentative -- has dismissed, clearly provides a practical
8 benefit to the moving parties here.

9 Eliminating the false light, defamation, breach of
10 contract, intentional infliction of emotional distress,
11 fraud, and constructive fraud/negligent misrepresentation
12 claim clearly changes the defense and the overall penumbra
13 of the case.

14 As the court has indicated, you know, you feel
15 that the case comes down to: You stole my name and
16 likeness.

17 Well, this case has now completely changed. All
18 of the claims, if they are, you know, kept out per your
19 tentative, this case is greatly simplified down to the one
20 cause of action that we've been discussing so --

21 THE COURT: That's a fair point. I'll go back and
22 look at the attorney's fees issue again.

23 MR. GORRY: Great. Thank you.

24 And I also have copies of the cases. I wasn't
25 able to give the other two cases to counsel; but I can give

1 them to him now if he wants or after the hearing if the
2 court so desires.

3 THE COURT: After the hearing, please.

4 MR. GORRY: Okay; thank you.

5 THE COURT: All right. Anyone on this side before
6 I give the plaintiffs an opportunity to -- I'm sure he wants
7 to respond on many fronts.

8 (*No response.*)

9 THE COURT: All right. If would you take the
10 lectern, please.

11 MR. WEGLARZ: Thank you, Your Honor.

12 Your Honor, first of all, I would like to make a
13 record that to the extent that the court does issue a final
14 ruling on these motions relying upon any of the new
15 authorities that the defendants are now discussing and
16 giving to us, that we have an opportunity to review those
17 authorities and to brief those authorities if need be.

18 Your Honor, a couple of things I would like to
19 address for the court and, actually, not that many. I do
20 respect the court's ruling. Though I do not agree with each
21 and everything in it, I do respect it.

22 However, I did anticipate that the defendants
23 would be attacking somewhat aggressively the court's ruling
24 on the finding of a *prima facie* case of misappropriation.

25 And if you just think about this case, if you

1 stand back and look at it as a whole, when you realize you
2 have this army soldier serving his country who is being
3 followed by this journalist for 30 days and this journalist
4 is videotaping him, photographing him, recording all of his
5 statements and interviews while being told at the same time:
6 Look, you know, I'm just doing this to do a story on EOD
7 operations in general.

8 And then when we step back and we learn that after
9 Sergeant Sarver confided in this reporter about all of his
10 personal details in his life, Mr. Boal observed the way he
11 dressed, his mannerisms, his height, the way his nose looked
12 in the shield, the way he specifically addressed a certain
13 mission, his personal habits of dress around the base, how
14 he treated his kid, how he didn't treat his kid, how he was
15 sometimes not the best father or husband or boyfriend.

16 THE COURT: Well, what about transformative use,
17 counsel? Because I've got to tell you even on the
18 *prima facie* standard, I found this to be quite a close call.

19 MR. WEGLARZ: And I appreciate that and --

20 THE COURT: For the reasons that I think some of
21 the reasons were highlighted by the defense in their
22 arguments.

23 MR. WEGLARZ: Sure.

24 Your Honor, the court found that, look, this is
25 different from all the other cases that I've looked at

1 addressing this issue: The *Polydoros* case, the other cases,
2 transformative use cases.

3 Here we have Sergeant Sarver who is portrayed in a
4 biography not just once, but twice. I mean, Mr. Boal sells
5 his article to *Playboy*; and there's a biography now out for
6 the whole world to see about Sergeant Sarver down to the
7 smallest detail of what he did in Iraq plus his personal
8 being as well as his life.

9 A few years later, Mr. Boal sells the rights to
10 that article to *Reader's Digest*. Again, there's another
11 biography displayed to the world talking about
12 Sergeant Sarver, his exploits while overseas and in the
13 military, his personal life, and his family life.

14 And I really thought when I looked at the
15 tentative ruling that really this court, rather than
16 ignoring the transformative use defense or even kind of
17 side-stepping it or even glossing over it, I thought the
18 court addressed and analyzed that defense right at its very
19 heart.

20 The court pointed out, unlike these other cases,
21 now you have publication to the whole world as to what this
22 guy's story is about.

23 The court also pointed out: Lookit. Here you
24 have this reporter who tagged him for 30 days, learned
25 everything about him, recorded everything about him; and we

1 even have the main character who is playing Sergeant Sarver,
2 Jeremy Renner, who says: Yeah, you know what? They kept
3 showing me this one guy who is like this Will James
4 character. This one guy. This was the character they
5 wanted me to be.

6 And the court didn't find that there's a lot of
7 similarities just because of that video. Of course not.

8 When you read that *Playboy* article and if you
9 watch that movie, how anyone can say that that movie is not
10 about Sergeant Sarver, I don't know. Because it clearly is.

11 And the transformative use defense, after the
12 court says: I look at all the elements for common-law
13 misappropriation and for the statutory cause of action for
14 misappropriation. I believe the plaintiff has presented
15 sufficient evidence for a *prima facie* case. But if you look
16 at the transformative use defense, it is analyzed and here's
17 what the defense says.

18 Transformative use provides that: Lookit. If an
19 artist wants to use someone's likeness and they want to
20 start it out as the kernel, you better use -- you better
21 transform it into some artistic impression; and trivial
22 transformations do not count.

23 It has to be significant. So significant that
24 once you now went from the plaintiff's likeness to the
25 artist's transformation of that likeness, you have to be

1 able to say: That's really not the plaintiff. That's
2 really the artist and what he did.

3 You have to look at: Is it predominantly the
4 artist creative expression or really what we see in the
5 movie of Will James? Are we really seeing predominantly
6 Sergeant Sarver?

7 If you read that article and if you watch that
8 movie, Will James is predominantly and is basically the main
9 character in that movie and that movie is nothing more --
10 and there are some trivial changes in it -- but that movie
11 is really nothing more than a movie about the life of
12 Sergeant Sarver and he does have a right to his name and his
13 likeness and he should be compensated for it.

14 Your Honor, having addressed that, I did want to
15 address one other thing in the tentative ruling if the court
16 will allow me to address that now.

17 Actually, I'm just responding to the argument set
18 forth by defense counsel; but if you wish for me to go ahead
19 and address --

20 THE COURT: Go ahead.

21 MR. WEGLARZ: Okay.

22 The one thing I wanted to touch upon, the court's
23 finding that the plaintiffs did not respond to a separate
24 motion that was based upon not the misappropriation claim of
25 the First Amendment, it was really just based upon the other

1 collateral claims: Defamation, negligent misrepresentation,
2 those types of claims.

3 I do apologize to the court to the extent that
4 when we filed our response and it was filed in two separate
5 briefs, that perhaps we did not make it clear that the
6 response brief was really a global response to all of the
7 motions.

8 And though we don't list Summit separately in the
9 response when we say we're responding to so and so's
10 motions, that's only because Summit just filed a joinder,
11 never labeled it as a motion, though I do understand they
12 did file a separate Memorandum of Points and Authorities.

13 So, in essence, we did respond to that motion
14 globally; and we also addressed some specifics representing
15 to the court and we understood this.

16 Look. With respect to Summit, we know they came
17 on towards the end. They weren't there for the filming of
18 the movie at least as far as we know right now. We
19 understand that.

20 And I represent to the court I would appreciate
21 having some discovery trying to figure out the role of
22 Summit's involvement.

23 I want to see all of the contracts, not just the
24 redacted contract that they gave to the court to base its
25 arguments upon, but maybe all of the contracts.

1 I would like to know what discussions did they
2 have with Boal and defendant Bigelow and Voltage Pictures.
3 Maybe they did really know. Maybe they did engage in these
4 things that was supported by a declaration and that was
5 addressed.

6 And, you know, the court -- I just want the court
7 to appreciate and I'm sure the court does that
8 Sergeant Sarver is a military member.

9 He survives on a mere pittance and we initially
10 filed this case in New Jersey thinking that was the place to
11 file because if you look at all the laws and you look at the
12 articles about what do you do in a multi-state publication?
13 Where do you file? What law applies? It's kind of murky.
14 It's not exactly clear.

15 A lot of the restatements state --

16 THE COURT: Well, but now that it's in California,
17 the court has to apply the anti-SLAPP -- do I have any
18 discretion since they're the prevailing party?

19 MR. WEGLARZ: I was looking at that.

20 I mean, really, the claims against Summit were
21 filed in New Jersey based upon New Jersey law. In fact,
22 Summit filed a motion, a 12(b)(6), based upon New Jersey
23 law.

24 So realizing that the court is granting the motion
25 with respect to the other claims just as it is with respect

1 to the other defendants, it's the same situation with
2 Summit.

3 I am respectfully requesting the court to make a
4 similar ruling with respect to the assessment of costs on
5 the anti-SLAPP.

6 Thank you very much, Your Honor.

7 THE COURT: Why don't you address counsel's fees
8 that even though they didn't -- or counsel's argument
9 regarding attorney's fees; that even though they did not
10 prevail in striking every claim, that the court's analysis
11 of that is not that one claim goes forward and so,
12 therefore, no attorney's fees.

13 It should be in looking at whether they've been
14 able to achieve some substantial benefit to their client's
15 case; and some apportionment would be appropriate even as to
16 the rest of the parties.

17 MR. WEGLARZ: It's a good question; but I think
18 the court's reasoning and analysis on that issue, I think,
19 is the appropriate one; that lookit. Let's face it. The
20 misappropriation claim is really the essence of this case.
21 I mean, this is about a movie about this person's life which
22 defendants are denying.

23 That is the claim that's the essence of everything
24 here. If that claim survives, which in the court's
25 tentative ruling it claims it does, we still have to go

1 through the same set of discovery.

2 Basically the same damages. It's just not
3 financial injury. It's any injury that the plaintiff
4 suffered whether it be emotional, problems at work, problems
5 with relationships, so the court is correct.

6 We're basically -- they really didn't gain a
7 significant benefit other than some extra claims are gone;
8 but we're all still going to go through the same work on
9 this case.

10 Thank you, Judge.

11 THE COURT: All right. Thank you.

12 I'll take the matter under submission and will
13 issue a written decision as soon as I can. Thank you.

14 ALL COUNSEL: Thank you, Your Honor.

15 THE CLERK: Court stands adjourned.

16 *(At 3:30 p.m. proceedings were concluded.)*

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CERTIFICATE

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United States.

Date: October 19, 2011

/s/ PAT CUNEO

OFFICIAL COURT REPORTER
CSR NO. 1600

EXHIBIT 1

0107

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SGT. JEFFREY S. SARVER,
Plaintiff,

v

THE HURT LOCKER, LLC, MARK
BOAL, KATHRYN BIGELOW, GREG
SHAPIRO, NICOLAS CHARTIER,
TONY MARK, DONALL McCUSKER,
SUMMIT ENTERTAINMENT, LLC,
VOLTAGE PICTURES, LLC,
GROSVENOR PARK MEDIA, LP,
FIRST LIGHT PRODUCTIONS, INC.,
KINGSGATE FILMS, INC., and
PLAYBOY ENTERPRISES, INC., Jointly
and Severally,
Defendants.

Case No.: 2:10-cv-09034-JHN
(JCx)

**SUPPLEMENTAL
DECLARATION OF FIRST
SGT. PAUL WILCOCK IN
SUPPORT OF PLAINTIFF'S
OPPOSITION TO
DEFENDANTS' MOTION TO
STRIKE PLAINTIFF'S
COMPLAINT PURSUANT TO
CAL. CIV. PROC. CODE
§425.16 [ANTI-SLAPP]**

**Date: 04-04-2011
Time: 02:00 pm
Courtroom: 790**

DECLARATION OF FIRST SGT. PAUL WILCOCK

I, First Sgt. Paul Wilcock, declare as follows:

1 1. I am a First Sergeant for the United States Army, and was stationed at
2 the Picatinny Arsenal located in Dover, New Jersey, during the year 2009. The facts
3 set forth in this declaration are personally known to me and I have firsthand
4 knowledge thereof. If called as a witness I could and would testify competently to
5 the facts set forth herein under oath.
6

7 2. During the summer of 2009, several service members, including myself,
8 heard that the Hurt Locker movie would be premiering / showing in New York.
9

10 3. Several service members, including Sgt. Sarver and myself, decided to
11 attend the Hurt Locker movie premiere. We were not invited to this premiere by Mr.
12 Mark Boal. Rather, we decided to attend on our own accord.
13

14 4. After traveling to the New York movie theater, Sgt. Sarver, myself, and
15 other service members waited in line, to pay for our tickets, after which we were
16 admitted to the theater where we watched the premiere showing of the Hurt Locker.
17

18 5. Though I was not deployed with Sgt. Sarver during the time Mr. Boal
19 was embedded with Sgt. Sarver's unit in Iraq in December of 2004, I got to know
20 Sgt. Sarver during the time we were both stationed at the Fort Picatinny Arsenal
21 during the year 2009. I became familiar with Sgt. Sarver's personality, mannerisms,
22 expressions, habits, and persona.
23
24

25 6. While watching the movie the Hurt Locker, I immediately recognized
26 that the main character in the movie, Will James played by Jeremy Renner, was not a
27 fictional character, but rather a complete and literal portrayal of Sgt. Sarver.
28

1 Throughout the movie, Jeremy Renner/Will James displayed the same personality,
2 expressions, habits, behaviors, demeanor, attitude and even physical characteristic of
3 my fellow soldier Sgt. Sarver.

4
5 7. During the movie, I commented that whoever was able to transform
6 Jeremy Renner into Sgt. Sarver deserved a gold medal.

7
8 8. After the movie, Mr. Boal and Ms. Bigelow sat themselves right in front
9 of our group, and started to answer questions from the audience.

10 9. During this question and answer session, Mr. Boal explained that the
11 movie was based upon his experiences with a single EOD team he spent time with
12 while embedded in Iraq in December of 2004.

13
14 10. Mr. Boal and Ms. Bigelow were very relaxed while openly talking about
15 the movie with the audience.

16
17 11. During the question and answer session, our Garrison Commander asked
18 Mr. Bigelow if he recognized the soldier seated (who was Sgt. Sarver) next to the
19 Commander.

20
21 12. In response, Mr. Boal answered that he recognized the soldier as Sgt.
22 Sarver.

23
24 13. Once Mr. Boal and Ms. Bigelow realized that Sgt. Sarver was in the
25 audience, their carefree demeanor quickly changed as their answers became short and
26 guarded, and they were in a hurry to leave the theater.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12 SGT. JEFFREY S. SARVER,
13 Plaintiff,

14 v

15 THE HURT LOCKER, LLC, MARK BOAL,
16 KATHRYN BIGELOW, GREG SHAPIRO,
17 NICOLAS CHARTIER, TONY MARK,
18 DONALL McCUSKER, SUMMIT
19 ENTERTAINMENT, LLC, VOLTAGE
20 PICTURES, LLC, GROSVENOR PARK
21 MEDIA, LP, FIRST LIGHT PRODUCTIONS,
22 INC., KINGSGATE FILMS, INC., and
23 PLAYBOY ENTERPRISES, INC., Jointly and
24 Severally,
25 Defendants.

) Case No.: 2:10-cv-09034-JHN (JCx)

) **DECLARATION OF SGT. JEFFREY**
) **S. SARVER**

) **Current Hearing Date: 04-04-2011**
) **Time: 02:00 pm**
) **Courtroom: 790**